

AUSTIN ENERGY POLE ATTACHMENTS

STANDARD POLE LICENSE AGREEMENT

This License Agreement ("Agreement") is between Austin Energy ("AE"), an electric utility wholly owned by the City of Austin, a Texas home-rule municipal corporation, and [*name*], a [*state*] [*corporate form*] ("Licensee"); hereinafter referred to individually as "Party" or collectively as "Parties".

WHEREAS, Licensee desires to provide telecommunications, video, internet, broadband or other data transmission services within AE's service area; and

WHEREAS, Licensee has obtained a franchise from the State of Texas or the City of Austin authorizing it to offer telecommunications, video, internet, broadband or other data transmission services, or is otherwise authorized by law to place attachments on AE Poles; and

WHEREAS, Licensee will need to place and maintain cables, equipment, or other facilities within AE's service area and desires to place such cables, equipment, and facilities on various Poles and easements owned by AE; and

WHEREAS, AE is willing to grant Licensee revocable, non-exclusive licenses to use certain AE Poles on the strict terms and conditions set forth in this Agreement and subject to the terms of the City of Austin's Infrastructure Usage Ordinance (Austin City Code Chapter 15-7) and the rules and regulations of the City of Austin adopted thereunder, as each may be amended from time to time; and

WHEREAS, AE is willing to allow Licensee to undertake the make-ready construction work necessary to prepare certain AE Poles to accommodate Licensee's cables, equipment, and facilities under the strict terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, AE and Licensee do hereby mutually covenant and agree as follows:

Article 1 – Definitions and Construction

1.1 **Definitions:** Capitalized terms in this Agreement shall have the same meanings given in Section 6 of the Utilities Criteria Manual (Pole Attachments). Otherwise, capitalized terms used in this Agreement are defined as follows:

Annual Usage Charge means the recurring charge that Licensee is to pay AE annually under this Agreement for the use of AE's Poles. The Annual Usage Charge is in addition to any Costs and Filing Fees Licensee may incur during a Contract Year, and shall be determined by AE as of December 1 of each Contract Year, other than the first Contract Year.

Contract Year means any calendar year during which this Agreement is in effect, beginning January 1 and ending December 31, except that the first Contract Year shall run from the Effective Date until December 31 of that year and the final Contract Year shall run from January 1 of that year until the date of termination.

Contractor includes subcontractors.

Cost means the total cost reasonably incurred by AE for any particular task under this Agreement, and includes without limitation reasonable labor, material, equipment usage, outside Contractor and vendor charges, reasonable overhead, and reasonable general and administrative expenses. Costs may be incurred for, without limitation, engineering and engineering review, Make-Ready construction, inspections and oversight, auditing, and other services. Certain Cost rates are specified in the fee schedules adopted as part of the City's annual budget ordinance, as may be amended. Cost rates shall be based on AE's actual and reasonable cost of labor, materials, and equipment usage. Subject to the foregoing, Costs shall be determined by AE in its reasonable judgment and reasonable discretion, and shall be paid by Licensee in accordance with either of the following, at AE's sole option:

1. Any advance estimate provided by AE, in which event AE shall have the right to refuse to incur the Costs until the estimate is paid; and/or
2. Any final invoice submitted by AE. In the event an advance estimate was paid by Licensee for Costs, the final invoice will reflect such payment.

Effective Date means the last date on which a party signs this Agreement as shown on the signature page of this Agreement.

Filing Fee means the initial, non-refundable fee charged to Licensee for filing an Application for an Attachment License. Filing Fees are currently set by city ordinance, though will be set by AE to the extent they are no longer set by ordinance (in which case the Filing Fee shall not exceed the actual and reasonable cost to AE of reviewing and processing an Application). The Filing Fee is solely to compensate AE for reviewing and processing an Application and does not include or offset Costs or Annual Usage Charges.

Infrastructure Usage Ordinance means Austin City Code Chapter 15-7 and any other City ordinance that may be enacted to govern electric utility infrastructure usage or rental.

Make-Ready means all work required to accommodate Licensee's Attachments on a Pole with respect to AE and Third Party User needs and in compliance with Applicable Standards, generally accepted engineering and construction practices, and applicable laws.

Third Party User means any attaching entity not part of this Agreement that has, or may be granted, a valid Attachment License or other right to attach with respect to an AE Pole.

Unauthorized Attachment means an Attachment or any other affixing or placing of Licensee's facilities onto AE property for which Licensee does not have a valid Attachment License, or which does not comply with the terms of this Agreement, the Section 6 of the Utilities Criteria Manual (Pole Attachments), Design Documents or the Electrical Code.

Usage Rate means, for each given Contract Year, the amount Licensee must pay AE for each Attachment.

1.2 **Interpretation.** Except as otherwise expressly provided herein, all nouns, pronouns and variations thereof shall be deemed to refer to the singular and plural. The descriptive headings in this Agreement are only for the convenience of the parties and shall not be deemed to affect the meaning or construction of any provision. The rule of construction that ambiguities in a contract are to be construed against the drafting party shall not apply to this Agreement. Any reference to a law, code or document shall mean such law, code or document as it may be amended from time to time.

1.3 **Third Party User Agreements** AE has in the past entered into other Pole usage agreements with Third Party Users. In construing this Agreement, no variations between this Agreement and other agreements with Third Party Users shall have any evidentiary value or be construed against AE.

1.4 **Compliance with Infrastructure Usage Ordinance and Rules** This Agreement is intended to further the goals and policies of the Infrastructure Usage Ordinance. The Infrastructure Usage Ordinance and Section 6 of the Utilities Criteria Manual (Pole Attachments) are incorporated by reference into, and are part of, this Agreement. Any changes to the Infrastructure Usage Ordinance or Section 6 of the Utilities Criteria Manual (Pole Attachments) shall be incorporated into and made part of this Agreement as of the effective date of the change. The absence in this Agreement of a provision that appears in the Infrastructure Usage Ordinance or Section 6 of the Utilities Criteria Manual (Pole Attachments), or vice versa, shall not be construed to relieve Licensee from complying with or being subject to such provision.

1.5 **State Law.** This Agreement is intended to comply with applicable state law. The terms of this Agreement govern Licensee's use of and access to AE Poles unless a term conflicts with a requirement of state law, in which case the state law shall govern.

Article 2 – Scope and Term of Agreement

2.1 **Term** This Agreement commences on the Effective Date and continues thereafter for an initial term of five (5) years. Following the expiration of the initial term, this Agreement shall automatically renew for successive one-year terms until such time that this Agreement is terminated by either Party upon giving the other Party six (6) months' written notice of termination. Expiration or termination of Licensee's privileges under this Agreement or under any valid Attachment License issued pursuant to this Agreement shall not relieve Licensee of any obligation, whether indemnity or otherwise, which has accrued prior to such expiration or termination.

2.2 **Existing Facilities Only** Except as otherwise set forth in [the] Section 6 of the Utilities Criteria Manual (Pole Attachments), (i) AE is under no obligation to add, build, keep, maintain, or replace Poles or any other facilities for the use or convenience of Licensee; and (ii) the maintenance, replacement, removal, relocation, or addition of AE Poles and facilities shall remain within the sole province and discretion of AE.

2.3 **Poles Only** This Agreement addresses only Attachments to AE Poles. This Agreement does not authorize Licensee to install or maintain Attachments on other AE property and facilities, including without limitation conduits, buildings, and towers.

2.4 **City Rights-of-Ways** Nothing in this Agreement shall be construed to grant Licensee any right or authorization to use or occupy the public streets or rights-of-way of the City of Austin, except for

the placement of Attachments on Poles or other facilities covered by this Agreement which may be located in the public streets or rights-of-way, including access in the public streets or rights-of-way to such Attachments.

2.5 **No Property Rights in Poles** All Poles shall remain the property of AE and no payment made by Licensee shall create or vest in Licensee any ownership right, title, or interest in any Pole, but Licensee's interest shall remain a bare license. The existence of such a license shall not in any way alter or affect AE's right to use, change, operate, maintain, or remove its Poles, subject to the terms and conditions hereof.

2.6 **License not Exclusive** Licensee acknowledges that AE has entered into before, and may enter into in the future, similar or other agreements concerning the use of Poles by third parties, including Licensee's competitors. Nothing in this Agreement shall be construed to limit or in any way affect AE's right or ability to enter into or honor other agreements, or to grant any rights, licenses, or access concerning any Pole, irrespective of the character or degree of economic competition or loss caused to Licensee.

2.7 **No Cost or Expense to AE** The engineering, construction, installation, use, operation, and maintenance of Licensee's Attachments shall be at Licensee's sole expense. Unless otherwise expressly provided herein, nothing in this Agreement shall be construed to require AE to expend any funds or to incur or bear any cost or expense.

Article 3 – Usage Rates and Charges

3.1 **Calculation of Usage Rates** For each Contract Year, the Usage Rate shall be calculated per the Infrastructure Usage Ordinance governing Pole attachments within AE's service territory.

- A. To the extent lawfully permitted, the Annual Usage Charge for any Contract Year shall be, for Wireline Attachments, the number of Wireline Attachments shown on AE's records to exist as of December 1 of the preceding Contract Year multiplied by the Usage Rate for the new Contract Year. Provided, however, that the calculation of the Annual Usage Charge will not include Wireline Attachments overlashed to any of Licensee's Attachment for which a Usage Rate is chargeable, unless applicable state or federal law is amended to allow such a charge. The Annual Usage Charge for a Network Node shall be calculated using the Usage Rate for Wireline Attachments on a linear per-foot basis.
- B. If Licensee disagrees in good faith with AE's determination of the Usage Rate, Licensee may protest in writing within thirty (30) days of receipt of the notice. The protest shall include copies of all records and other documentation that support Licensee's position.
- C. Failure to timely protest AE's proposed Usage Rate shall constitute agreement to and acceptance of AE's determination.
- D. If Licensee does timely protest a proposed Usage Rate, the parties shall endeavor in good faith to negotiate a resolution of the dispute. If the parties are unable to resolve the dispute within sixty (60) days from the date of Licensee's protest, then either party may

seek judicial relief or, if the dispute is within a state agency's administrative jurisdiction, relief from the Public Utility Commission of Texas.

- E. If the dispute is not resolved by the time the Annual Usage Charge invoice is issued, Licensee shall nonetheless pay the invoice based upon the disputed Usage Rate. Payment by Licensee of the invoice shall not prejudice Licensee's ability to continue to contest the Usage Rate, and AE agrees not to interpose any claim, defense, or counterclaim that Licensee has waived its right to contest the Usage Rate by paying the disputed invoice.

3.2 **Subsequent Annual Usage Charges** In each January of each Contract Year and continuing thereafter until the termination of this Agreement, AE will invoice for, and Licensee shall pay, within forty-five (45) days after receipt of invoice, the Annual Usage Charge for the new Contract Year.

3.3 **Invoice Disputes** If Licensee believes in good faith that an invoice is incorrect, it may pay the invoice under protest. To protest an invoice, Licensee must give AE written notice of the nature of its protest no later than the due date for payment of the invoice together with copies of records and other documentation supporting its position. If Licensee's protest concerns the Attachment count used to calculate the Annual Usage Charge, the parties shall promptly meet to resolve the discrepancies in their records to determine the correct Attachment count. If the parties are unable to resolve a discrepancy as to the correct count, the parties shall jointly conduct a physical inventory of a statistically significant number of geographical grids or other mutually agreeable census to determine the correct count. The cost to conduct such inventory or census shall be equally divided between the parties.

3.4 **Adjustments** If upon resolution of a dispute between the parties under paragraph 3.1 or paragraph 3.3, a refund is due to Licensee, AE shall refund the amount of the overcharge together with interest at the rate specified in paragraph 9.5 from the date of AE's receipt of the protested Annual Usage Charge payment. If Licensee owes additional money, a corrected invoice shall be issued by AE for the additional Annual Usage Charge due, plus accrued interest at the rate specified in paragraph 9.5 from the due date of the original invoice.

3.5 **No Allowances** Unless otherwise expressly stated in this Agreement, there shall be no offsets against any sums due under this Agreement, or any other allowances, for system improvement, materials or labor supplied, upgrading, life extension, or other direct or incidental benefits conferred by Licensee upon AE or its Poles, system, or facilities. All such improvements and benefits belong solely to AE, and the fact that such improvements or benefits may accrue shall in no way alter or affect Licensee's obligations under this Agreement.

Article 4 – General Requirements

4.1 **Work Site Safety** In performing any work on or near Poles supporting energized electric lines, Licensee, and its Contractors, agents and employees shall comply with Chapter 752 of the Texas Health and Safety Code and all federal, state and local laws, rules and regulations governing work in proximity to energized electric lines, including without limitation, those promulgated by the Occupational Safety and Health Administration. LICENSEE SHALL DEFEND, INDEMNIFY AND HOLD THE CITY HARMLESS FROM AND AGAINST ALL CLAIMS, DEMANDS, ACTIONS, SUITS AND JUDGMENTS ARISING FROM OR CONCERNING A BREACH BY LICENSEE OF ITS OBLIGATIONS UNDER THIS PARAGRAPH.

4.2 **Laws** To the extent that the Code of the City of Austin lawfully requires Licensee to possess a valid franchise or construction permit before engaging in a particular act, Licensee must comply with such requirement before beginning Make-Ready construction or installing Attachments. Nothing in this Agreement shall be construed as waiving other City requirements or permitting the construction of facilities other than Attachments. Attachments must conform to local, state, and federal law. Licensee's Attachments and Licensee's use of any Pole shall at all times conform to the requirements of the City Code, the Infrastructure Usage Ordinance, and the published policies and rules promulgated by the City pursuant thereto, including Section 6 of the Utilities Criteria Manual (Pole Attachments).

Article 5 – Unauthorized Attachments

5.1 **Unauthorized Attachments** Licensee shall not place any Attachments on a Pole or other AE infrastructure except as authorized by an Attachment License. If one or more unauthorized Attachments are discovered, AE may, but shall not be required to, remove the unauthorized Attachment without incurring any liability to Licensee and at Licensee's sole Cost. With respect to any unauthorized Attachment, AE may opt to:

- A. require that Licensee remove such unauthorized Attachment upon demand or, if Licensee fails to do so, AE may remove such Attachment at Licensee's sole cost and risk or suspend processing of Licensee's Attachment Applications until the unauthorized Attachment is removed; or
- B. require that Licensee submit an Application for each such unauthorized Attachment, together with the then-current application filing fee and Annual Usage Charge relating back to the installation date of such unauthorized Attachment, or the time at which such Attachment was deemed an unauthorized Attachment pursuant to the terms and conditions of under the terms of the License Agreement. If such Application and charges are not received by AE within fifteen (15) days of notice of the unauthorized Attachment, AE may then opt to proceed under part A of this section.

5.2 **Excessive Unauthorized Attachments** If AE determines that Licensee has made more than fifty (50) Unauthorized Attachments of cable cumulatively during any Contract Year, or five (5) Unauthorized Attachments of Network Nodes, Licensee shall be considered to be in material breach of this Agreement and AE will have the right to terminate this Agreement and require removal of Licensee's Attachments in accordance with Article 6 of this Agreement.

5.3 **Remedies Cumulative** The remedies afforded AE under this Agreement are in addition to any civil or criminal penalties provided by the Infrastructure Usage Ordinance for Unauthorized Attachments or related rules.

5.4 **Ratification Must Be in Writing** No act or failure to act by AE with respect to an Unauthorized Attachment or any other unauthorized use of AE Poles or property shall be considered to be a ratification, licensing, or permitting of the unauthorized use, irrespective of any otherwise applicable doctrine of waiver or laches.

Article 6 – Termination

6.1 **Right of Suspension** If Licensee fails either to make any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or to perform timely any material obligation under this Agreement, and such default continues for thirty (30) days after the date the payment or performance is due, then, in addition to any other available right or remedy, AE may, upon written notice to Licensee, immediately suspend all Attachment Licenses of Licensee and decline to review any application for Attachment Licenses of Licensee, until such time as the default is cured. The payment under protest of a disputed amount in order to avoid, or lift, suspension of Attachment Licenses shall not prejudice the rights of Licensee to continue the payment dispute. A suspension of Attachment Licenses under this paragraph shall not prevent Licensee from operating, maintaining, repairing or removing its existing Attachments, but Licensee shall not install any new or additional Attachments or make any changes to existing Attachments (except for removal or routine repair or maintenance necessary to continue to provide services to then-existing Licensee customers) during the period of suspension.

6.2 **Termination of Agreement by AE** If Licensee fails either to pay any payment required under this Agreement, including timely payments to Contractors for Make-Ready Work, or timely perform any material obligation under this Agreement, and if such default has not been cured within ninety (90) days of Licensee's receipt of written notice of default, AE may terminate this Agreement and all Attachment Licenses upon written notice to Licensee. Upon receipt of a notice of termination, Licensee shall promptly begin the process of removing all Attachments from Poles. All such Attachments shall be removed within thirty (30) days after the date of the notice of termination, or within such time as AE may agree. Until all of Licensee's Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Such payment by Licensee or acceptance by AE of Annual Usage Charges shall not act to cure the default that triggered the termination nor shall it reinstate this Agreement or Licensee's Attachment Licenses hereunder. If in the director's sole discretion and determination, Licensee's default is isolated to an Attachment License, AE may terminate the Attachment License allowing for notice and cure in accordance with this paragraph.

6.3 **Failure to Remove Attachments** If Licensee has not removed all its Attachments within the period of time specified in the preceding paragraph, or such additional period of time granted by AE in writing, then AE may remove Licensee's Attachments at Licensee's sole Cost and risk, in which event Licensee shall pay to AE as liquidated damages, and not as a penalty, for the use and occupancy of AE Poles a sum equal to one half of the monthly Usage Rate for each Pole Contact for each month (or part thereof) until all such Attachments have been removed. Alternatively, AE may, in its reasonable discretion and upon written notice to Licensee, deem the Attachments to have been abandoned and assume ownership thereof.

6.4 **Termination of Agreement by Licensee** Licensee may terminate this Agreement or an Attachment License upon sixty (60) days written notice to AE, in which event all Attachments shall be removed within one hundred-twenty (120) days after the date of the notice of termination or within such other time as AE agrees. Until all of Licensee's Pole Attachments are removed, Licensee shall continue to comply with all of the terms of this Agreement and perform all of its duties and obligations hereunder, including without limitation the obligation to pay Annual Usage Charges for its Attachments. Termination

by Licensee during a Contract Year shall not relieve Licensee from payment for the full Annual Usage Charge for that Contract Year or any other sums owing AE.

6.5 **Survival** Licensee's obligations under this Article shall survive termination of this Agreement.

Article 7 – Assignments

7.1 **Permissible Assignments** Licensee may not assign or otherwise transfer this Agreement or any Attachment Licenses without AE's prior written consent, except that Licensee may without consent:

- A. transfer or assign this Agreement to an affiliate or subsidiary of Licensee. Licensee's rights and obligations hereunder shall pass to such successor only upon receipt by AE of written notice of such transfer or assignment, together with true copies of the documents specified in paragraph 7.2 below; and
- B. lease capacity on its telecommunications system and network to another service provider that provides telecommunications services, as defined in the Telecommunications Act of 1996. No such lease of capacity shall relieve Licensee of any of its obligations or duties hereunder, and any failure of performance, non-payment or other default by such lessee, shall be deemed to be a failure of performance, non-payment or default by Licensee, for which AE may assert all available rights and remedies under this Agreement or under law or in equity. In the event of a lease of capacity, Licensee shall deliver to AE contemporaneous copies of all information and documents that Licensee is required to provide AE under its franchise. Nothing in this Agreement shall be construed to grant any Attachment Licenses to any party leasing capacity from Licensee; and
- C. mortgage any or all of its property, rights, privileges and franchises, or to enter into any merger, consolidation, or sale of its assets in the area served by AE substantially in their entirety. Licensee shall provide advance written notice of foreclosure, merger, consolidation or sale, together with true copies of the documents specified in paragraph 7.2 below within thirty (30) days of closing such transaction.

7.2 **Information to AE** In the event of a transfer or assignment of this Agreement, Licensee shall provide AE with true and complete copies of the transfer or assignment documents; documents showing the ownership of the assignee and its relationship to Licensee, if any; a copy of the assignee's most current audited annual financial statement (or unaudited financial statement if an audited annual financial statement has not been prepared); a copy of the assignee's franchise with the City, if any; copies of all insurance certificates and bonds required by this Agreement; and such other information as AE may reasonably request.

7.3 **Other Assignments Void** A purported assignment or transfer made in violation of the provisions of this Article 7 shall not be binding upon AE and shall be deemed to be a material default of this Agreement.

7.4 **Assignment by AE** AE may assign this Agreement in whole or in part without the consent of Licensee. AE shall give Licensee written notice of the transaction within ten (10) days after closing.

7.5 **Partial Assignments** If Licensee sells, conveys, or transfers some, but not all, of Licensee's Attachments, and such assignment complies with this Article 7, the assignee must nonetheless obtain a separate agreement from AE for the assignee's Attachments in accordance with City of Austin and AE policies, rules, regulations and Ordinances in effect at that time. Until the assignee executes a separate agreement, the assignment is not binding upon AE and the assignee's Attachments shall continue to be deemed to be the Attachments of Licensee for all purposes hereunder, including billing and payment of Annual Usage Charges.

Article 8 – Liability & Indemnity; Warranty

8.1 **AE Liability** AE reserves to itself the right to maintain and operate its Poles in such manner as will best enable it to fulfill its own service requirements, subject in all respects to the terms and conditions of this Agreement. AE shall not be liable for any damages incurred by Licensee for damage or interruption to its Attachments except for actual repair costs caused by the negligence or intentional misconduct of AE; provided, however, that AE shall not be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's Attachments. **NEITHER AE NOR LICENSEE SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL DAMAGES ARISING IN CONNECTION WITH THE USE OF OR DAMAGE TO AE'S OR LICENSEE'S FACILITIES.**

8.2 **No Warranties by AE** Licensee is expected to inspect the Poles on which its Attachments will be placed and shall rely solely on such inspection to determine the suitability of the Poles for its purposes. **AE DOES NOT MAKE, AND HEREBY EXPRESSLY DISCLAIMS, ANY EXPRESS OR IMPLIED WARRANTIES CONCERNING ANY POLE, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. LICENSEE ACCEPTS THE USE OF ALL POLES AS IS, WHERE IS, AND WITH ALL FAULTS, EXCEPT AS OTHERWISE PROVIDED HEREIN.**

8.3 **Unsafe Poles** Licensee acknowledges and agrees that AE does not warrant the condition or safety of AE's Poles, or the premises surrounding the Poles, and LICENSEE HEREBY ASSUMES ALL RISKS OF AND INDEMNIFIES AE FROM ANY DAMAGE, INJURY OR LOSS OF ANY NATURE WHATSOEVER CAUSED BY OR IN CONNECTION WITH LICENSEE'S OR LICENSEE'S CONTRACTORS' USE OF THE POLES AND ASSOCIATED FACILITIES AND EQUIPMENT ON, WITHIN, OR SURROUNDING THE POLES. Licensee expressly agrees that it will undertake responsibility for inspecting and evaluating the condition of any Pole before allowing any workers, whether those of Licensee or Licensee's Contractors, to climb or otherwise work on such Pole. If Licensee discovers any Poles that are rotten or otherwise unsafe for climbing or Attachment installation, Licensee shall immediately report such unsafe condition to AE. Licensee further acknowledges that AE does not warrant that all Poles are properly labeled, and agrees that AE is not liable for any injuries or damages caused by or in connection with missing labels or otherwise improperly labeled Pole. Licensee further agrees to immediately notify AE if labels or tags are missing or otherwise improper.

8.4 **Dangerous Nature of the Work** Licensee acknowledges that in performing the work contemplated by this Agreement, Licensee and its agents, servants, employees, and Contractors will work near electrically energized lines, transformers, and other electrical equipment, and it is the intention that the power flowing through such facilities will not be interrupted except by AE. Licensee shall ensure that

its employees, servants, agents, and Contractors have the necessary qualifications, skill, knowledge, training, and experience to protect themselves, their fellow employees, employees of AE, and the general public, from harm or injury while performing work permitted by this Agreement. In addition, Licensee shall furnish its employees, and shall require its agents and Contractors to furnish their employees, with competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. Licensee further warrants that it is apprised of, conscious of, and understands the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM ELECTROCUTION) inherent in the work necessary to make installations on AE's Poles by Licensee's employees, servants, agents, and Contractors, and accepts it as its duty and sole responsibility to notify and inform Licensee's employees, and to require its agents and Contractors to inform their employees, of such dangers, and to keep them informed regarding same.

8.5 **Licensee Liability and Indemnity** Subject only to paragraph 8.7, Licensee shall defend, indemnify and hold harmless AE and the City of Austin and all affiliated entities of AE and the City of Austin, whether existing now or in the future, and their respective officials, officers, departments, agencies, boards, representatives, employees, agents, Contractors and attorneys against any and all liability, claims, costs, damages, fines, taxes, penalties, punitive damages, expenses, demands, lawsuits or disputes (including reasonable attorney fees of counsel selected by AE and all other costs and expenses of litigation) arising from or related to any of the following:

- A. All acts or omissions by Licensee or its Contractors done in the course of Make-Ready or installation construction or in the maintenance, use, or operation of Licensee's Attachments;
- B. Any work performed by AE that was necessitated by the installation, maintenance, presence, use or removal of Licensee's Attachments or from any work this Agreement authorizes AE to perform on Licensee's behalf;
- C. All claims or causes of action for damage to property or injury to or death of any persons, including payments made by AE under any Worker's Compensation Laws or under any plan for employees' disability and death benefits, arising out of the erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to AE's facilities or the property of any other Third Party User, or by any act or omission of Licensee on or in the vicinity of AE's Poles;
- D. All claims or causes of action for property damage, bodily injury or death arising out of the performance or nonperformance of any work or obligation undertaken by Licensee pursuant to this Agreement;
- E. Any claim or cause of action related to Licensee's erection, maintenance, repair, presence, use, relocation, transfer or removal of Licensee's Attachments, including liabilities incurred as a result of violation of any law, rule, or regulation of the United States, State of Texas or any other governmental entity or administrative agency;

- F. A violation of any state or federal law arising out of Licensee's erection, maintenance, repair, presence or use, relocation, transfer or removal of Licensee's Attachments or the proximity of Licensee's Attachments to AE's facilities or the property of any Third Party User, or by any act or omission of Licensee on or in the vicinity of AE's Poles, whether such violation is the result of a violation of a statute by AE or the Licensee solely or any joint violation thereof.
- G. Claims of governmental bodies, property owners or others alleging that Licensee does not have a sufficient right or authority for placing and maintaining Licensee's facilities at the locations of Poles owned by AE or joint users.
- H. Claims for taxes by others that arise directly or indirectly from the construction, maintenance or operation of Licensee's facilities.
- I. Claims or causes of action caused by or relating in any manner to a breach of this Agreement or a failure to follow the terms of this Agreement by Licensee or its agents and employees or by Licensee's contractors or their agents and employees.
- J. All claims or causes of action of Third Party Users alleging interference from Licensee's Attachments or damage to Third Party User Attachments or facilities.
- K. Any third party claims or causes of action alleging that Licensee's use of any hardware, software or other materials embedded in Licensee's Attachments infringes or misappropriates such third party's intellectual property rights in such hardware, software or other materials.

8.6 AE Fault SUBJECT ONLY TO PARAGRAPH 8.7, IT IS THE EXPRESS INTENT OF THE PARTIES THAT THE FOREGOING INDEMNITY IS TO PROTECT AND INDEMNIFY AE AND THE CITY OF AUSTIN AGAINST THE CONSEQUENCES OF ITS OWN FAULT WHERE AE'S OR THE CITY'S FAULT IS A CONCURRENT CAUSE OF THE INDEMNIFIED LIABILITY.

8.7 Joint Liability The indemnity obligations set forth in paragraph 8.5 shall apply to fully protect and indemnify AE and the City of Austin from all such claimed damages unless the indemnified liability was the result of intentional or reckless misconduct or negligence on the part of AE or the City of Austin, or their agents, servants, employees, or contractors, in which case each party shall be liable for its found percentage of damages in accordance with Texas law based upon a final judgment in which a finder of fact determines AE's and/or the City of Austin's percentage of responsibility for the indemnified liability.

8.8 Other Indemnification Provisions No indemnification provision contained in this Article shall be construed in any way to limit any other indemnification provision contained in this Agreement.

8.9 Licensee's Construction Warranty LICENSEE WARRANTS AND GUARANTEES TO AE THAT ALL MAKE-READY WORK WILL CONFORM TO THE SECTION 6 OF THE UTILITIES CRITERIA MANUAL (POLE ATTACHMENTS) AND THE DESIGN DOCUMENTS, BE PERFORMED IN A GOOD AND WORKMANLIKE MANNER IN ACCORDANCE WITH THIS AGREEMENT, AND WILL NOT BE DEFECTIVE. LICENSEE'S WARRANTY

AND GUARANTEE HEREUNDER EXCLUDES DEFECTS OR DAMAGE CAUSED BY: (I) ABUSE, MODIFICATION OR IMPROPER MAINTENANCE OR OPERATION BY PERSONS OTHER THAN LICENSEE, ITS SUBCONTRACTORS OR SUPPLIERS; OR (II) NORMAL WEAR AND TEAR UNDER NORMAL USAGE.

8.10 **Survival** This Article 8 shall survive the termination of this Agreement.

Article 9 – Miscellaneous Provisions

9.1 **Integration** This Agreement constitutes the entire understanding of the parties relating to the use of Poles hereunder; and there shall be no modification or waiver hereof except by writing, signed by the party asserted to be bound thereby. There are no oral representations or agreements between the parties. All previous agreements, correspondence, statements, and negotiations are superseded by this Agreement.

9.2 **No Waiver** The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in duly force and effect.

9.3 **Applicable Law** The parties hereto agree and intend that all disputes that may arise from, out of, under or respecting the terms and conditions of this Agreement, or concerning the rights or obligations of the parties hereunder, or respecting any performance or failure of performance by either party hereunder, shall be governed by the laws of the State of Texas, without application of its Conflict of Laws provisions. The parties further agree and intend that venue shall be proper and shall lie exclusively in Travis County, Texas, except where otherwise provided herein and except where the Texas Public Utilities Commission lawfully has jurisdiction.

9.4 **Severability** If any term, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants and provisions of this Agreement shall remain in full force and effect.

9.5 **Payments & Interest** All monetary payments under this Agreement shall be due and payable within forty-five (45) days after receipt of invoice. All overdue balances shall accrue interest at the rate of one-percent (1%) per month from the due date until paid, or the maximum rate allowed by law, whichever is less.

9.6 **Notices** When notice is required to be given under this Agreement by either party, it shall be in writing mailed or delivered to the other party at the following address or to such other address as either party may from time to time designate in writing for that purpose. All notices shall be effective upon receipt.

City

Austin Energy
721 Barton Springs Road
Austin, TX 78704
Phone (512) 322-6148
Fax (512) 505-3938
Attn: Vice President, ESD

Licensee

With a copy to:
Austin Energy - Infrastructure Asset
Management
Attn: Manager
721 Barton Springs Road
Austin, TX 78704

IN WITNESS WHEREOF, the undersigned have executed this Agreement through their duly authorized representatives.

LICENSEE: _____

By: _____

Name: _____

Title: _____

Date: _____

CITY OF AUSTIN d/b/a AUSTIN ENERGY

By: _____

Name: _____

Title: _____

Date: _____